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No. 323

IN THE

Supreme Court of the United States

October Term, 1963

SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,
Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS IN OPPOSITION

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INDEX

	PAGE
Brief of Respondent American Society of Composers, Authors and Publishers In Opposition ..	1
Question Presented	1
Statutes Involved	2
Statement	2
Argument	4
I. The Decision Below Is Clearly Correct ...	5
An Appeal Cannot Be Taken to the Court of Appeals in a Civil Action Brought by the United States under the Antitrust Laws	5
II. There Is No Conflict of Decisions	8
III. There Is No Important Question of Federal Law	11
Conclusion	13

CITATIONS

CASES:

Aluminum Company of America v. *United States*, 302 U. S. 230 (1937)	7
Arkadelphia Milling Co. v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134 (1919)	6-7
Brown Shoe Co. v. *United States*, 370 U. S. 294 (1962)	5
Chrysler Corporation v. *United States*, 316 U. S. 556 (1942)	6
Ford Motor Co. v. *United States*, 335 U. S. 303 (1948)	6
Magee-Hale Park-O-Meter Co. v. *Vehicular Parking, Ltd.*, 180 F. 2d 879 (3d Cir. 1950) ...	10, 11

PAGE

St. Louis, Iron Mountain & Southern Ry. Co. v. *J. F. Hasty & Sons*, 255 U. S. 252 (1921) .. 7

Sam Fox Publishing Co. v. *United States*, 366 U. S. 683 (1961) 6

Shenandoah Valley Broadcasting, Inc., et al. v. *ASCAP*, 371 U. S. 540 (1963) 8

Swift & Co. v. *United States*, 276 U. S. 311 (1928) 6

Terminal Railroad Ass'n of St. Louis v. *United States*, 266 U. S. 17 (1924) 7

United States v. *ASCAP*, S.D.N.Y. Civ. No. 13-95 3

United States v. *California Cooperative Canneries*, 279 U. S. 553 (1929) 5, 6

United States v. *FMC Corp.*, Memorandum Opinion of Mr. Justice Goldberg, Aug. 9, 1963 ..... 9, 10

United States v. *Swift & Co.*, 286 U. S. 106 (1932) 6

United States v. *Terminal Railroad Ass'n of St. Louis*, 236 U. S. 194 (1915) 6

STATUTES AND RULES:

Expediting Act of February 11, 1903, 32 Stat. 823 (1903), as amended, 15 U.S.C. §29 (1952) 2, 3, 5, 6, 7, 8, 9, 10, 12

28 U.S.C. §1291 .....2, 9, 10

28 U.S.C. §1292 9

Rule 73(a) of the Federal Rules of Civil Procedure 8

MISCELLANEOUS:

Hart & Wechsler, The Federal Courts and The Federal System (1953) 6

Robertson & Kirkham, Jurisdiction of the Supreme Court (Wolfson & Kurland ed. 1951) 6

Senate Bill 1892, 88th Cong., 1st Sess. (1963) .. 12, 13

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BRIEF OF RESPONDENT AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS IN OPPOSITION

Respondent, American Society of Composers, Authors and Publishers ("ASCAP" or the "Society"), submits this brief in opposition to the petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Question Presented

The Society respectfully submits that the only question here raised is the following:

In a civil antitrust action brought by the United States and subject to the Expediting Act (15 U.S.C. §29), did the Court of Appeals correctly decide it lacked jurisdiction to entertain an appeal filed by persons who are not parties to the action and whose prior direct appeal to this Court had been dismissed?

Statutes Involved

The pertinent statutory provisions here involved are Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823 (1903), as amended, 15 U.S.C. §29 (1952), and 28 U.S.C. §1291 (1952).

Section 2 of the Expediting Act provides:

> "In every civil action brought in any district court of the United States under any of said Acts [the antitrust laws], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

28 U.S.C. §1291 provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Statement

On December 18, 1961, petitioners, acting as the "All-Industry Television Station Music License Committee", applied to the United States District Court for the South-

ern District of New York for an order determining the reasonable fee to be paid for a music performance license on terms prescribed by petitioners and differing radically from those theretofore requested and obtained by petitioners from ASCAP (R. 43a-65a).* Petitioners claimed that they were entitled to this relief under provisions of the Amended Final Judgment which had been entered on consent in 1950 in the Government's antitrust action against ASCAP (*United States* v. *ASCAP*, S.D.N.Y. Civ. No. 13-95).

On September 14, 1962, the District Court ruled that it had no power under the consent decree to compel ASCAP to issue a license on the terms demanded by petitioners and that, therefore, the Court could not fix a fee for such a license (App. C to Petition). The Court afforded petitioners an opportunity to apply for the type of license to which they are entitled under the consent decree (App. C6), but petitioners refused to do so, whereupon their application was dismissed by the District Court on October 10, 1962 (R. 10a).

Petitioners then sought to appeal directly to the Supreme Court under the Expediting Act. That attempted appeal was dismissed by this Court on January 14, 1963 (R. 293a).

After dismissal of their attempted appeal to this Court, petitioners sought to appeal to the United States Court of Appeals for the Second Circuit. Respondent moved to dismiss that appeal for lack of jurisdiction and the Govern-

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* Page references prefixed by the symbol "R." refer to petitioners' appendix filed in the Court of Appeals, which is Volume I of the record herein.

ment supported the motion. The Court of Appeals granted the motion, and the appeal was dismissed on May 7, 1963 (App. B to Petition). Petitioners are now seeking a writ of certiorari to review the judgment dismissing that attempted appeal.

Argument

The petition for a writ of certiorari should be denied for the following reasons:

1. The Court of Appeals correctly ruled that it was without jurisdiction to entertain an appeal in a civil action that was brought by the United States under the antitrust laws.

2. There is no conflict of decisions that warrants review by this Court.

3. In any event, the issue raised by the petition is uniquely narrow and does not warrant review by this Court.

I.

The Decision Below is Clearly Correct

An Appeal Cannot Be Taken to the Court of Appeals in a Civil Action Brought by the United States under the Antitrust Laws

An appeal in a civil action brought by the United States under the antitrust laws can be taken only from "the final judgment of the district court" and "will lie only to the Supreme Court". 15 U.S.C. §29 (1952); *United States* v. *California Cooperative Canneries,* 279 U. S. 553 (1929). Thus, as the Supreme Court stated in *California Cooperative Canneries* (per Mr. Justice Brandeis), "the Court of Appeals was without jurisdiction of an appeal in a suit in equity under the Antitrust Act in which the United States is the complainant." 279 U. S. at 559. See also *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 305 n. 9 (1962).

The *California Cooperative Canneries* case is particularly applicable because there, as here, the order involved (an order of the District Court denying leave to intervene) was entered long after the entry of the consent decree in issue and was entered against a non-party rather than against the United States or a party defendant. The Court observed that the Expediting Act was similar to a predecessor act in that "in cases where the appeal was taken direct to this Court from the final decree in the trial court, every appeal thereafter taken in the cause was necessarily also to this Court." 279 U.S. at 559.

Whether the appeal is sought to be taken by a party or a non-party, the Supreme Court has never departed from

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the rule that appeals in actions coming within the reach of the Expediting Act can be taken, if at all, only to the Supreme Court. Indeed, in the recent past, an appeal from an order in this very action was taken directly to the Supreme Court. *Sam Fox Publishing Co.* v. *United States,* 366 U. S. 683 (1961).

It is thus clear that, where an action is one within the compass of the Expediting Act, the Act "precludes an appeal to the court of appeals." *Hart & Wechsler, The Federal Courts and The Federal System* 1372 (1953); *Robertson & Kirkham, Jurisdiction Of The Supreme Court* §171 (Wolfson & Kurland ed. 1951). This is true even for proceedings brought after the entry of the final judgment in the original action if those proceedings are instituted as part of, or as a supplement to, an action within the coverage of the Expediting Act.

For example, an appeal lies directly to the Supreme Court from a decree of the District Court modifying its prior decree, *Ford Motor Co.* v. *United States,* 335 U. S. 303 (1948); *Chrysler Corporation* v. *United States,* 316 U. S. 556 (1942); *United States* v. *Swift & Co.,* 286 U. S. 106 (1932), or from a decree of the District Court entered upon the mandate of the Supreme Court. *United States* v. *Terminal Railroad Ass'n of St. Louis,* 236 U. S. 194 (1915). Where an application to vacate the final decree is made pursuant to a reservation in that decree, the ruling on the motion is appealable directly to the Supreme Court. *Swift & Co.* v. *United States,* 276 U.S. 311 (1928).

Appeals from supplemental decrees run directly to the Supreme Court, *United States* v. *California Cooperative Canneries,* 279 U. S. 553, 559 (1929); *Arkadelphia Mill-*

ing Co. v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134 (1919); *St. Louis, Iron Mountain & Southern Ry. Co.* v. *J. F. Hasty & Sons*, 255 U. S. 252 (1921), as does the appeal from a decree entered by the District Court in a civil contempt proceeding brought to enforce rights claimed under a prior decree which was directly appealable to the Supreme Court. *Terminal Railroad Ass'n of St. Louis* v. *United States*, 266 U. S. 17 (1924).

Even where the defendants attempted to restrain the United States from bringing another antitrust action—some 25 years after the first suit—an appeal from the District Court order on the application went directly to the Supreme Court. *Aluminum Company of America* v. *United States*, 302 U. S. 230 (1937).

The purpose of the Expediting Act would be defeated if private persons not parties to a consent decree could appeal questions of its construction to the Court of Appeals. To permit such appeals would produce the possible anomaly that, if the judgment dissatisfied both ASCAP and a non-party applicant under Section IX, ASCAP would appeal to the Supreme Court while the non-party applicant would appeal the same question to the Court of Appeals. Or if the judgment dissatisfied both the United States and a non-party, the United States might appeal to the Supreme Court while the non-party applicant was seeking review in the Court of Appeals.

Clearly, then, the Court of Appeals could not entertain the petitioners' attempted appeal from the judgment of the District Court, which was entered in a proceeding brought under the consent decree in the Government's antitrust action against ASCAP and which construed the scope and meaning of that decree and refused to modify it.

Nor can petitioners escape the Expediting Act by claiming that their appeal is not in a civil antitrust action commenced by the United States, as they apparently attempt to do in claiming that "the present proceeding involves an essentially private controversy between petitioners and ASCAP" (Petition, p. 9). If this characterization is correct, petitioners have their private remedies available, since the judgment of the District Court bound them to nothing.*

Furthermore, the appeal to the Court of Appeals was filed more than 30 days after the judgment of the District Court and therefore, unless taken under the 60-day time limit for suits in which the United States is a party, must be dismissed for lack of jurisdiction as untimely. Rule 73(a), Fed. Rules Civ. Proc. Thus, even if the action were not one in which the United States is a party, the Court of Appeals would have lacked jurisdiction because the appeal thereto would have been untimely.

II.

There Is No Conflict of Decisions

Petitioners assert that the dismissal of their attempted appeal to the Court of Appeals conflicts with the decision of this Court of January 14, 1963, *Shenandoah Valley Broadcasting, Inc., et al.* v. *ASCAP*, 371 U. S. 540 (1963)

* Petitioners would not have been bound even if they had elected to obtain determination of a fee for the type of license ASCAP is required to grant them. The music user who applies under Section IX of the Amended Final Judgment does not thereby become a party to the action. Under Section IX, ASCAP is bound to issue such a license at the fee determined by the Court, but the music user is not obliged to take it. Thus, the Court's determination under Section IX does not bind the music user to anything.

(R. 293a), dismissing for "want of jurisdiction" petitioners' attempt to take a direct appeal to the Supreme Court under the Expediting Act.

Petitioners urge that, since this Court has held it lacked jurisdiction over petitioners' direct appeal, Section 1291 vests jurisdiction in the Court of Appeals. Petitioners suggest that this must follow because Section 1291 gives the Court of Appeals jurisdiction of all appeals from all final decisions of the District Courts "except where a direct review may be had in the Supreme Court." This reading of Section 1291, as Mr. Justice Goldberg recently held in considering an exactly parallel question arising under the same exception clause in Section 1292 of the Judicial Code,

> "would do violence to the plain meaning of the Expediting Act, the basic congressional policy there expressed, and the decisions of this Court. . . .". *United States* v. *FMC Corp.*, denial of application for preliminary injunction, August 9, 1963 (Slip Opinion pp. 5-6).

As Mr. Justice Goldberg's opinion makes crystal clear, the exceptions to Sections 1291 and 1292 exclude from the jurisdiction of the Courts of Appeals any decision—final or interlocutory—in an antitrust action brought by the United States. An appeal to the Supreme Court under the Expediting Act may be dismissed for a multitude of reasons, such as lack of finality, or lack of standing to appeal by the person seeking review, or lack of standing to intervene before the District Court. If this Court lacks appellate jurisdiction under the Expediting Act for such a reason, the result is that no appeal may be taken and not, as petitioners urge, that Section 1291 creates substitute appellate jurisdiction in the Court of Appeals.

Petitioners, who were not parties to the antitrust action brought by the United States, sought review in this Court under the Expediting Act of a ruling by the District Court that they were, in effect, seeking a modification of the consent decree which they had no standing to seek. As the Court of Appeals pointed out (Petition, App. B-8 – B-10), this Court's dismissal of their appeal was parallel to dismissals, by this Court, of appeals in Government antitrust cases by persons asserting abuse of discretion in denial of permissive intervention or error in the denial of intervention claimed as of right.

Dismissal of petitioners' attempted direct appeal no more created appellate jurisdiction in the Court of Appeals than in any of the intervention cases dismissed by this Court. Accordingly, the decision of the Court of Appeals is consistent with prior decisions of this Court, including the latest expression on a parallel question by Mr. Justice Goldberg in *United States* v. *FMC Corp.*, *supra*. Indeed, Mr. Justice Goldberg cited the instant decision of the Court of Appeals with approval. *Id.*, Slip Opinion, p. 3 n. 7.

Petitioners also seek to create a conflict of rulings between different circuits by citing *Magee-Hale Park-O-Meter Co.* v. *Vehicular Parking, Ltd.*, 180 F. 2d 879 (3d Cir. 1950). Again, Judge Friendly correctly disposed of this contention when he observed with respect to the brief suggestion of Judge Biggs that an appeal might some day be taken to the Court of Appeals in a proceeding brought under a Government antitrust decree:

> "It is wholly unrealistic to take this remark as a considered determination that, despite the plainly

contrary implications of *Terminal R.R. Ass'n* v. *United States*, 266 U. S. 17, 28 (1924), such an appeal would lie to the court of appeals rather than to the Supreme Court. Prompted by a question from the bench, counsel for ASCAP have furnished us with copies of the briefs in Magee-Hale; they reveal no discussion of that issue, which, indeed, was hardly relevant. As our own experience has shown, *United States* v. *New York, N.H. & H.R.R.*, 276 F. 2d 525, 537 (2 Cir.), *cert. denied*, 262 U. S. 961 (1960), it is all too easy for a court of appeals, which exercises general appellate authority over final decisions of district courts, to forget, unless reminded by counsel, that a few such appeals are not its business. When an issue as to its role in appeals under the Expediting Act has been squarely presented, the Third Circuit has made its position plain. *Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (3 Cir. 1939), *cert. denied*, 309 U. S. 687 (1940). Appellants' reliance on the statement in Magee-Hale is thus answered *a fortiori* by what Chief Justice Marshall said long ago: 'No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the Court does not consider itself as bound by that case.' *United States* v. *More*, 3 Cranch. (7 U. S.) 159, 172 (1805)."

III.

There Is No Important Question of Federal Law

In striving to give the issue they seek to present a generalized significance, petitioners point out that "many antitrust decrees entered in recent years contain provisions allowing specified persons or classes of persons, not parties

to the antitrust decree itself, to apply to the district court in which the decree was entered for enforcement of certain provisions thereof enacted for their benefit" (Petition at p. 13).

Petitioners then cite a number of consent decrees that contain provisions enabling non-parties to obtain judicial fee determinations when they cannot agree on the fee for the use of a patent or some other property. Petitioners ignore the fact that their appeal does not raise that question because the proceedings below never reached a fee determination. Petitioners declined to proceed to such a determination. Hence they seek to appeal only from an order of the District Court which ruled that the petitioners —who were not parties to the Government's antitrust action or to the consent decree entered therein—cannot obtain a modification of the decree. The United States did not appeal from the dismissal of the petitioners' application and, indeed, supported ASCAP's motion to dismiss the appeal to the Court of Appeals.

Petitioners also attempt to brush aside the pending Senate bill that may result in a complete revision of the Expediting Act and thereby make the Court of Appeals' decision a matter of only historical interest.

Although Senate Bill 1892 (88th Cong., 1st Sess.) contains no provisions relating specifically to the rights of non-party beneficiaries under decrees entered in Government antitrust actions, the decision of the Court of Appeals did not turn on whether the appellants are parties or non-parties. It held that, in Government antitrust actions, no appeal may be taken to the Court of Appeals whether ap-

pellants are parties or non-parties. S. 1892, if enacted, will clearly change the law on that point.*

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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* S. 1892, 88th Cong., 1st Sess. (1963), provides, in pertinent part:

"In any action in which a certificate has not been filed, appeal may be taken to the court of appeals from any final judgment entered therein, as provided in section 1291 of title 28 of the United States Code, and from interlocutory orders, as provided in section 1292(a)(1) of title 28 of the United States Code but not otherwise; and any judgment entered by the court of appeals in such case shall be subject to review by the Supreme Court of the United States upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code."